Supreme Court, U.S.
FILED
NOV 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 85-21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

DOUGLAS V. RIGLER*
KAPLAN RUSSIN & VECCHI
1218 Sixteenth Street, NW
Washington, DC 20036
202-638-0060

Attorneys for Petitioner Square D Company

*Counsel of Record

DONALD L. FLEXNER*
WM. RANDOLPH SMITH
CLIFTON S. ELGARTEN
PETER K. LEVINE
CROWELL & MORING
1100 Connecticut Avenue, NW
Washington, DC 20036
202-452-5800

Attorneys for Respondent Dominion-Consolidated Truck Lines

*Counsel of Record

[Additional Counsel Listed on Inside Cover]

PETITION FOR CERTIORARI FILED JULY 5, 1985
CERTIORARI GRANTED OCTOBER 7, 1985

BEST AVAILABLE COPY

LINDA HELLER KAMM
MICHAEL FISCHER
FOLEY & LARDNER
1775 Pennsylvania Avenue, NW
Washington, DC 20006
202-862-5300

JOSEPH E. ZDARSKY
KAVINOKY & COOK
120 Delaware Avenue
Buffalo, NY 14202
716-856-9234

Attorneys for Petitioner Square D Company

H. LADDIE MONTAGUE
ALAN M. SANDALS
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
215-875-3000

ARNOLD LEVIN
HOWARD SEDRAN
LEVIN AND FISHBEIN
320 Walnut Street
Philadelphia, PA 19106
215-592-1500

Attorneys for Petitioner Big D Building Supply Corp.

BRYCE REA, JR.
DONALD E. CROSS
REA, CROSS & AUCHINCLOSS
1 Thomas Circle, NW
Washington, DC 20005
202-785-3700

SANFORD M. LITVACK
DONOVAN, LEISURE, NEWTON & IRVINE
30 Rockefeller Plaza
New York, NY 10112
212-307-4100

Attorneys for Respondent Niagara Frontier Tariff Bureau, Inc.

LESTER M. BRIDGEMAN
LOUIS E. EMERY
BRIDGEMAN & URBANCZYK
1112 Sixteenth Street, NW
Washington, DC 20036
202-429-9223

Attorneys for Respondent Inter-City Truck Lines (CANADA), Inc.

PETER D. STANDISH
JOEL B. HARRIS
PHILIP A. BYLER
WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, NY 10153
212-310-8000

Attorneys for Respondent TNT Canada, Inc.

PETER A. GREENE
CHARLES L. FREED
THOMPSON, HINE AND FLORY
1920 N Street, NW
Washington, DC 20036
202-331-8800

Attorneys for Respondent ICL International Carriers, Ltd.

JOHN W. BRYANT
EAMES, WILCOX, MASTEJ AND BRYANT
900 Guardian Building
Detroit, Michigan 48226
313-963-3750

Attorneys for Respondent Bondy Cartage, Ltd.

INDEX

	Page
Relevant Docket Entries	JA-1
Square D Complaint	JA-4
Big D Complaint	JA-15
Motion of All Defendants for Judgment on the Pleadings as to Plaintiffs' Damage Claims	JA-29

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 83-1958

SQUARE D Co., *Plaintiff*

v.

NFTB, et al., *Defendants*

and

Civ. No. 83-2978

BIG D BUILDING SUPPLY CORP., *Plaintiff*

v.

NFTB, et al., *Defendants*

RELEVANT DOCKET ENTRIES

	1983
Square D Complaint, filed.	July 8
Big D Complaint, filed.	October 7
	1984
Order transferring actions from the District of Columbia to the United States District Court for the Western District of New York	January 23

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Civ. No. 84-158C

SQUARE D Co., *Plaintiff*

v.

NFTB, et al., *Defendants*

and

Civ. No. 84-157C

BIG D BUILDING SUPPLY CORP., *Plaintiff*

v.

NFTB, et al., *Defendants*

RELEVANT DOCKET ENTRIES

	1984
Motion of all Defendants for Judgment on the Pleadings as to Plaintiffs' Damage Claims, filed.	March 7
Plaintiffs' Memorandum in Opposition to the above Motion, filed.	April 10
Defendants' Joint Reply to the above Opposition, filed.	May 7
Oral argument held.	June 19
Order consolidating the cases entered.	June 27
Order and Judgment dismissing the complaints entered (596 F. Supp. 153 (W.D.N.Y. 1984)).	September 25
Plaintiffs' Notice of Appeal, filed.	October 9

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 84-7831

SQUARE D Co., *et al., Plaintiffs,*

v.

NFTB, et al., *Defendants*

RELEVANT DOCKET ENTRIES

	1984
Appellants' Brief, filed.	November 30
Joint Brief of Appellees, filed.	December 21
	1985
Appellants' Reply Brief, filed.	January 2
Oral argument held.	January 14
Decision affirming in part and reversing and remanding in part entered (760 F.2d 1347 (2nd Cir. 1985)).	April 9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOYCE HENS GREEN, J.

COMPLAINT

15 U.S.C. § 1

Class Action for Violations of Antitrust Laws

Civil No.: 83-1958

SQUARE D COMPANY,
Executive Plaza
Palantine, Illinois 60067
312-387-2600

Plaintiff,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC.,
BONDY CARTAGE LIMITED,
DOMINION-CONSOLIDATED TRUCK LINES LIMITED,
ICL INTERNATIONAL CARRIERS, LTD.,
INTER-CITY TRUCK LINES (CANADA), INC.,
TNT CANADA, INC.,

Defendants.

Filed: July 8, 1983

Trial by Jury Demanded

JURISDICTION

1. This action arises under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to obtain injunctive relief and to recover treble damages and the costs of suit, including a reasonable attorneys' fee, for the injuries sustained by plaintiff and the members of the class which it represents resulting from violations by the defendants of Section 1 of the Sherman Act, 15 U.S.C. § 1. The juris-

diction of this Court is founded on Section 1 of the Sherman Act (15 U.S.C. § 1), on Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26), on 28 U.S.C. § 1337 and on 28 U.S.C. § 1391.

2. Each defendant is found, transacts or does business in the District of Columbia or in the United States.

THE PARTIES

3. Plaintiff, Square D Company, is a Michigan corporation having its principal place of business at Executive Plaza, Palantine, Illinois. Square D purchased freight transport by motor carrier between the United States and the Province of Ontario, Canada from one or more of the defendants during the period of time covered by this Complaint.

4. Niagara Frontier Tariff Bureau, Inc. ("NFTB" or "Bureau") is made a defendant herein. NFTB is a non-profit, no share incorporated bureau organized and existing under the laws of the State of New York with offices in Williamsville, New York. NFTB's permissible activities are described in a rate bureau agreement approved by the ICC.

5. Bondy Cartage Limited ("Bondy") is made a defendant herein. Bondy is a corporation organized and existing under the laws of the Province of Ontario, Canada with its headquarters in Windsor, Ontario. It is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

6. Dominion-Consolidated Truck Lines Limited ("Dominion Consolidated") is made a defendant herein. Dominion-Consolidated is a corporation organized and existing under the laws of the province of Ontario, Canada with headquarters in Toronto, Ontario. It is a wholly-owned subsidiary of Dominion-Consolidated Holdings Limited,

also an Ontario corporation, headquartered in Toronto, Ontario. Dominion-Consolidated was formed in 1970 by the merger of two Ontario-based motor carriers, Dominion Freightways Limited and Consolidated Truck Lines. Dominion-Consolidated is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

7. ICL International Carriers, Ltd. ("ICL") is made a defendant herein. ICL is a corporation organized and existing under the laws of the province of Ontario, Canada with a head office in Windsor, Ontario. It is a subsidiary of Industrial Cartage Co., Inc., a Michigan corporation, which in turn is wholly-owned by Piggy Back Services, Inc., a Michigan corporation headquartered in Detroit, Michigan. ICL is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

8. Inter-City Truck Lines (Canada), Inc. ("Inter-City") is made a defendant herein. Inter-City is a corporation organized and existing under the laws of the province of Ontario, Canada with headquarters in Toronto, Ontario. It is a wholly-owned subsidiary of N.M. David Corporation Limited, an Ontario corporation. Inter-City is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

9. TNT Canada, Inc. ("TNT") is made a defendant herein. TNT is a corporation organized and existing under the federal laws of Canada with headquarters in Mississauga, Ontario. TNT is a subsidiary of All Trans Canada, Inc., an Ontario corporation which in turn is owned by Thomas Nationwide Transport, Ltd. of Sydney, Australia. TNT was formed in March 1980 through the amalgamation of several companies including Overland Western Limited

("Overland Western"), a motor carrier holding extra-provincial and common carrier authority. Subsequent to the amalgamation, Overland Western's operations were subsumed in the Overland Express Division of TNT. TNT is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

CO-CONSPIRATORS

10. In addition to the above-named defendants, other persons and entities participated as co-conspirators with the defendants in the violations alleged herein and acted in furtherance thereof.

CLASS ACTION ALLEGATIONS

11. Plaintiff herein brings this action for itself and as a representative of all members of a class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The class represented by plaintiff is composed of all persons, excluding defendants, their subsidiaries and parents, and excluding government entities, which, during the period of time covered by this complaint, purchased freight transport by motor carrier between the United States and the Province of Ontario, Canada from defendants. This class is so numerous, being in the thousands, that joinder of all members is impracticable. Plaintiff is an established corporation which routinely purchased freight transport between various locations in the United States and the Province of Ontario, Canada during the period of the violation. There are questions of law and fact common to the plaintiff and all other class members with respect to the violations of the Sherman Act alleged. These common questions predominate over any questions affecting only individual members. There would be little, if any, interest among members of the class in individually controlling the prosecution of these actions. On information and belief no liti-

gation other than that instigated by the United States government has been filed with respect to these violations. Like the present action, the government's civil action is already lodged in this Court. The claims asserted herein are similar to those in other antitrust class actions, including antitrust class actions involving the purchase of transport service, and present no unusual problem in the management of a class action. This class action is superior to other alternatives for the adjudication of this controversy.

DEFINITIONS

12. As used herein, the term:

a) "Person" means any natural person, firm, partnership, association or corporation;

b) "Motor carrier" means a person providing motor vehicle transportation of freight for compensation;

c) "Common carrier authority" means operating authority granted to a motor carrier by the Interstate Commerce Commission ("ICC");

d) "Ontario Highway Transport Board" means the Ontario governmental agency that regulates motor carrier transportation in, to or from Ontario, Canada;

e) "Extra-provincial authority" means authority granted to a motor carrier by the Ontario Highway Transport Board ("OHTB") to transport freight across the United States/Ontario border;

f) "Rate bureau" means an organization established or continued under an agreement approved by the ICC under 49 U.S.C. § 5b, currently codified at 49 U.S.C. § 10706 (b)(2);

g) "Tariff" means rates, fares and charges filed with a governmental agency by a motor carrier or rate bureau for the transportation and handling of freight.

TRADE AND COMMERCE

13. Motor carrier transportation is the primary means of transporting freight between the United States and Canada. A substantial portion of United States/Canadian freight traffic flows into, from or through the Province of Ontario.

14. To transport freight across the U.S./Canadian border, a motor carrier must have the requisite governmental authority. To engage in the transportation of interstate or foreign commerce of the United States, a motor carrier must obtain operating authority from the ICC (49 U.S.C. § 303(c), currently codified at 49 U.S.C. § 10921). To operate into or from the Province of Ontario, it must also obtain extra-provincial authority from the OHTB.

15. During all or part of the time pertinent to this complaint, the defendant motor carriers held extra-provincial and common carrier authority.

16. In addition to regulating operating authority, both the ICC and the OHTB regulate some other, but not all, aspects of motor carrier transportation. The ICC requires motor carriers transporting freight pursuant to common carrier operating authority to file with the ICC in Washington D.C. tariffs which contain all rates for transportation, to make the tariffs available for public inspection, and to implement changes in rates only after thirty days notice to the ICC and the public, unless the ICC specifically grants permission for a shorter notice period (49 U.S.C. § 317, currently codified at 49 U.S.C. § 10762). The ICC is empowered in certain circumstances to determine and prescribe just and reasonable rates for motor carriers; it does not, however, dictate motor carriers' rates in the first instance (49 U.S.C. § 316, currently codified at 49 U.S.C. § 10704). The OHTB similarly requires motor carriers to file tariffs, to adhere to the rates in the tariffs and to

implement changes only after 30 days notice; it does not prescribe rates.

17. The Reed-Bulwinkle Act, which was passed in 1948, authorizes two or more motor carriers subject to the jurisdiction of the ICC to apply to it for approval of an agreement to establish a rate bureau to set rates collectively (49 U.S.C. § 5b, currently codified at 49 U.S.C. § 10706 (b)(2). Upon ICC approval, parties to such an agreement are relieved from the operation of the antitrust laws, provided their actions conform to the procedural requirements set forth in the approved agreement. Every such agreement must reserve to each of its members the right to take a rate action independent of the rates set collectively by the rate bureau (49 U.S.C. § 5b(6), currently codified at 49 U.S.C. § 10706(b)(2)(B)(ii). Relief from the antitrust laws under the Reed-Bulwinkle Act is strictly limited to the terms of the approved agreement, and it does not extend to conduct that the ICC is not empowered to authorize, or if empowered, has not authorized.

18. During all or part of the time covered by this complaint, each of the motor carriers named as defendants herein was a party to the collective ratemaking agreement approved by the ICC for the NFTB. Niagara Frontier Tariff Bureau—Agreement, 297 I.C.C. 494 (1955) (hereinafter "NFTB agreement"). The NFTB agreement remained in effect for all times pertinent to this complaint. The NFTB agreement authorized the members of the NFTB to set rates collectively for motor carrier freight traffic between the United States and Canada, through authorized committees, provided the carriers adhered to the procedures set forth in the NFTB agreement and ICC regulations, including a variety of notice, publication and public hearing procedures. At all times pertinent to this complaint. the NFTB agreement preserved each carrier's right to take independent action.

19. The international traffic revenues of NFTB carriers with the requisite authority to transport freight across the United States/Canada border were at least $330.3 million in 1980 and $344.8 million 1979. For the period 1970 through approximately 1980, international traffic revenues of such NFTB carriers were $2.8 billion. The defendant motor carriers and their co-conspirators accounted for most of the cross-border traffic among NFTB motor carriers.

20. The transportation of freight between the United States and the Province of Ontario, Canada is in the interstate and foreign commerce of the United States and affects the interstate and foreign commerce of the United States.

VIOLATIONS ALLEGED

21. Beginning at least as early as 1966 and continuing at least into 1981, the exact dates being unknown to the plaintiff, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate and foreign trade and commerce of the United States in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

22. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise and maintain prices and to inhibit or eliminate competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada without complying with the terms of the NFTB agreement and by otherwise engaging in conduct that either was not or could not be approved by the ICC.

23. In furtherance of the aforesaid combination and conspiracy the defendants and co-conspirators have done those things that they combined and conspired to do, including among others:

a) Participated in a Principals Committee which was comprised of the senior management officials of NFTB carriers that had extra-provincial authority. The Principals Committee was not authorized or approved by the ICC to engage in ratemaking conduct. Through the Principals Committee, the defendants and co-conspirators engaged in the joint setting of rates and related policies and also agreed upon methods by which to inhibit competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada;

b) Set and controlled NFTB rate levels without complying with the notice, publication, public hearing or record keeping requirements of the NFTB agreement and ICC regulations;

c) Held Principals Committee and other meetings to plan threats, coercion and retaliation against an NFTB member carrier for exercising its right of independent action;

d) Through pressure, coercion, threats of retaliatory rate reductions, taking retaliatory rate reductions, internal NFTB practices, and other means, interfered with, restrained and restricted the right of NFTB member carriers and non-member carriers to make rates independent of the NFTB agreed-upon rates;

e) Filed tariffs with the ICC in Washington, D.C. that were in furtherance of the conspiracy.

EFFECTS

24. The combination and conspiracy has had the following effects:

a) Rates for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada have been fixed, raised or maintained at artificial and non-competitive levels;

b) Competition between and among the defendant motor carriers, their co-conspirators and other persons engaged in the transportation of freight by motor carrier between the United States and Ontario, Canada has been restrained;

c) Competition generally in trade and commerce in the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada has been suppressed;

d) Purchasers of freight transport between the United States and the Province of Ontario, Canada were deprived of free and open competition.

FRAUDULENT CONCEALMENT

25. Plaintiff had no knowledge of the above-described antitrust violations or any facts which might have led to the discovery thereof until July 1983. Plaintiff could not have discovered the violations at an earlier date by the exercise of due diligence because of the deceptive practices and techniques of secrecy employed by the defendants and their co-conspirators to avoid detection of and fraudulently conceal such violations.

INJURY

26. As a direct result of the unlawful conduct of defendants and their co-conspirators alleged herein, since at least 1966, plaintiff and the members of the class have not been able to purchase transportation at rates determined by free and open competition and have been injured in their business and property in that they have paid more for motor freight transport between the United States and the Province of Ontario, Canada than they would have paid in a freely competitive market.

PRAYER FOR RELIEF

WHEREFORE PLAINTIFF PRAYS THAT:

(A) The Court adjudge and decree that each defendant has engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act.

(B) Plaintiff and members of the class recover threefold the damages determined to have been sustained by each of them respectively.

(C) Each defendant, its successors, assignees, subsidiaries, and transferees, and its respective officers, directors, agents and employees, and all other persons acting or claiming to act on behalf thereof or in concert therewith, be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the aforesaid violations of the Sherman Act.

(D) This Court grant such other, further and different relief as may be deemed just and proper.

(E) Plaintiff and members of the class recover the costs of this suit, together with a reasonable attorneys fee.

TRIAL BY JURY IS DEMANDED

FOLEY, LARDNER, HOLLABAUGH & JACOBS

By /s/ DOUGLAS V. RIGLER
Douglas V. Rigler
Linda H. Kamm
Michael Fischer
Jane A. Golden
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
202-862-5300

Of Counsel:

David E. Beckwith, Esq.
Foley & Lardner
777 E. Wisconsin Ave.
Milwaukee, WI 53202
414-271-2400

Dated: 8 July 1982

JOYCE HENS GREEN, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action

No. 83-2978

BIG D BUILDING SUPPLY CORP.
200 Broadway
Saranac Lake, New York
Individually and on behalf of
all others similarly situated,
Plaintiff

VS.

NIAGARA FRONTIER TARIFF BUREAU, INC.,
BONDY CARTAGE LIMITED,
DOMINION-CONSOLIDATED TRUCK LINES, LTD.
ICL INTERNATIONAL CARRIERS, LTD.,
INTER-CITY TRUCK LINES, LTD.,
TNT CANADA, INC.,
Defendants

[Filed October 7, 1983]

COMPLAINT - CLASS ACTION

Jury Trial Demanded

Plaintiff, by its undersigned attorneys, brings this civil action against the above named defendants for injunctive relief and for treble damages due to defendants' violations of the antitrust laws, and alleges as follows:

I. JURISDICTION AND VENUE

1. This action arises under Section 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to obtain injunctive relief

and to recover damages and the costs of suit, including a reasonable attorneys' fee, for the injuries sustained by plaintiff and the members of the class which it represents resulting from violations by the defendants and their co-conspirators, as hereinafter alleged, of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1337.

3. Each of the defendants named in this Complaint transacts business within this District, and each of said defendants is within the jurisdiction of this Court for the purpose of service. Many of the unlawful acts done pursuant to the combination and conspiracy hereinafter alleged have been performed within this District. The interstate commerce described hereinafter is carried on, in part, within this District. Venue is laid in this District pursuant to the provisions of 15 U.S.C. § 22 and 28 U.S.C. § 1391. The defendants are found or transact business or are doing business in this Judicial District and/or the claim arose in this District.

II. PLAINTIFF

4. Plaintiff, Big D Building Supply Corp., is a corporation formed under the laws of the State of New York. Plaintiff is engaged in, *inter alia*, the business of distributing, wholesaling and retailing plumbing fixtures and supplies. In the course of its business and during the period of time covered by this Complaint, plaintiff utilized the services of defendants and/or their co-conspirators in the transportation of goods to and from New York State and Ontario, Canada. Plaintiff has been injured in its business or property by reason of the antitrust violations alleged herein.

III. DEFENDANTS

5. The corporations named below are made defendants herein. Each of said defendants is either incorporated under the laws of a State of the United States of America or the Province of Ontario, Canada.

(a) Niagara Frontier Tariff Nureau, Inc. ("NFTB" or "Bureau") is made a defendant herein. NFTB is a non-profit, no share incorporated rate bureau organized and existing under the laws of the State of New York with offices in Williamsville, New York. NFTB's permissible activities are described in a rate bureau agreement approved by the ICC.

(b) Bondy Cartage Limited ("Bondy") is made a defendant herein. Bondy is a corporation organized and existing under the laws of the Province of Ontario, Canada with its headquarters in Windsor, Ontario. It is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

(c) Dominion-Consolidated Truck Lines Limited ("Dominion Consolidated") is made a defendant herein. Dominion-Consolidated is a corporation organized and existing under the laws of the province of Ontario, Canada with headquarters in Toronto, Ontario. It is a wholly-owned subsidiary of Dominion-Consolidated Holdings Limited, also an Ontario corporation, headquartered in Toronto, Ontario. Dominion-Consolidated was formed in 1970 by the merger of two Ontario based motor carriers, Dominion Freightways Limited and Consolidated Truck Lines. Dominion-Consolidated is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

(d) ICL International Carriers, Ltd. ("ICL") is made a defendant herein. ICL is a corporation organized and

existing under the laws of the Province of Ontario, Canada with a head office in Windsor, Ontario. It is a subsidiary of Industrial Cartage Co., Inc. a Michigan corporation, which in turn is wholly-owned by Piggy Back Services, Inc., a Michigan corporation headquartered in Detroit, Michigan. ICL is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

(e) Inter-City Truck Lines (Canada), Inc. ("Inter-City") is made a defendant herein. Inter-City is a corporation organized and existing under the laws of the Province of Ontario, Canada with headquarters in Toronto, Ontario. It is a wholly-owned subsidiary of N.M. Davis Corporation Limited, an Ontario corporation. Inter-City is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

(f) TNT Canada, Inc. ("TNT") is made a defendant herein. TNT is a corporation organized and existing under the federal laws of Canada with headquarters in Mississauga, Ontario. TNT is a subsidiary of All Trans Canada, Inc., an Ontario corporation which in turn is owned by Thomas Nationwide Transport, Ltd. of Sydney, Australia. TNT was formed in March, 1980 through the amalgamation of several companies including Overland Western Limited ("Overland Western"), a motor carrier holding extra-provincial and common carrier authority. Subsequent to the amalgamation, Overland Western's operations were subsumed in the Overland Express Division of TNT. TNT is a motor carrier which holds extra-provincial and common carrier authority, and it engages in the transportation of freight between the United States and Canada.

IV. CO-CONSPIRATORS

7. Various persons not made defendants participated as co-conspirators with the defendants in the violations alleged herein and have performed acts and made statements in furtherance thereof.

V. CLASS ACTION ALLEGATIONS

8. Plaintiff, Big D Building Supply Corp., brings this action on behalf of itself and as a class action under the provisions of Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure as representative of the class defined herein:

(a) The class consists of all individuals, proprietorships, partnerships, corporations and other business entities, in the United States (excluding defendants, their subsidiaries and their affiliates) who have, during the period of time covered by the conspiracy alleged in the Complaint, engaged the services of the defendants and their co-conspirators for the transportation of goods between the United States and the Province of Ontario, Canada.

(b) The members of the class are so numerous as to make joinder of the class members impracticable. Plaintiff is presently unable to state the precise size of the class, which plaintiff believes numbers in the thousands; however, the size of the class and the identity of its members should be readily ascertainable from defendants' own books and records.

(c) Plaintiff will fairly and adequately protect the interests of the class. The interest of plaintiff is co-incident with, and not antagonistic to, that of the remainder of the class. In addition, plaintiff is represented by experienced and able counsel who have both prosecuted and defended antitrust class actions.

(d) Plaintiff's claims are typical of those to be asserted by the class. Except as to the amount of damages each member of the class has by itself sustained, all other questions of law and fact are common to the class.

(e) Because the only non-common issue is the amount of individual damages to each particular class member, common questions of law and fact plainly predominate. Class action treatment is a superior method for the fair and efficient adjudication of the controversy herein described, because it permits a large number of injured persons, the joinder of whom is impracticable, to prosecute their common claim in a single forum simultaneously. The class members are readily identifiable from information in the hands of the defendants, and the class action provides an efficient method whereby the enforcement of their rights can be fairly managed. Plaintiff believes that the class size will not present unusual problems of management or notice.

(f) Each of the members of the class, including plaintiff, has utilized the services of one or more of the defendants and/or their co-conspirators during the period covered by this Complaint and has sustained damages as a result of the combination and conspiracy herein alleged.

VI. DEFINITIONS

9. As used herein, the term:

(a) "Person" means any natural person, firm, partnership, association or corporation;

(b) "Motor Carrier" means a person providing motor vehicle transportation of freight for compensation;

(c) "Common carrier authority" means operating authority granted to a motor carrier by the Interstate Commerce Commission ("ICC");

(d) "Ontario Highway Transport Board" means the Ontario governmental agency that regulates motor carrier transportation in, to or from Ontario, Canada;

(e) "Extra-Provincial Authority" means authority granted to a motor carrier by the Ontario Highway Transport Board ("OHTB") to transport freight across the United States/Ontario boarder;

(f) "Rate Bureau" means an organization established or continued under an agreement approved by the ICC under 49 U.S.C. § 5b, currently codified at 49 U.S.C. § 10706(b)(2);

(g) "Tariff" means rates, fares and charges filed with a governmental agency by a motor carrier or rate bureau for the transportation and handling of freight.

VII. TRADE AND COMMERCE

10. Motor carrier transportation is the primary means of transporting freight between the United States and Canada. A substantial portion of United States/Canadian freight traffic flows into, from or through the Province of Ontario.

11. To transport freight across the U.S./Canadian border, a motor carrier must have the requisite governmental authority. To engage in the transportation of interestate or foreign commerce of the United States, a motor carrier must obtain operating authority from the ICC (49 U.S.C. § 303(c) currently codified at 49 U.S.C. § 10921). To operate into or from the Province of Ontario, it must also obtain extra-provincial authority from the OHTB.

12. During all or part of the time pertinent to this Complaint, the defendant motor carriers held extra-provincial and common carrier authority.

13. In addition to regulating operating authority, both the IPC and the OHTB regulate some other, but not all,

aspects of motor carrier transportation. The ICC requires motor carriers transporting freight pursuant to common carrier operating authority to file with the ICC in Washington, D.C. tariffs which contain all rates for transportation, to make the tariffs available for public inspection, and to implement changes in rates only after thirty days notice to the ICC and the public, unless the ICC specifically grants permission for a shorter notice (49 U.S.C. § 317, currently codified at 49 U.S.C. § 10762). The ICC is empowered in certain circumstances to determine and prescribe just and reasonable rates for motor carriers; it does not, however, dictate motor carriers' rates in the first instance (49 U.S.C. § 316, currently codified at 49 U.S.C. § 10704). The OHTB similarly requires motor carrier to file tariffs, to adhere to the rates in the tariffs and to implement changes only after 30 days notice; it does not prescribe rates.

14. The Reed-Bulwinkle Act, which was passed in 1948, authorizes two or more motor carriers subject to the jurisdiction of the ICC to apply to it for approval of an agreement to establish a rate bureau to set rates collectively, 49 U.S.C. § 5b, currently codified at 49 U.S.C. § 10706(b)(2). Upon ICC approval, parties to such an agreement are relieved from the operation of the antitrust laws, provided their actions conform to the procedural requirements set forth in the approved agreement. Every such agreement must reserve to each of its members the right to take a rate action independent of the rates set collectively by the rate bureau (49 U.S.C. § 5b(6), currently codified at 49 U.S.C. § 10706(b)(2)(B)(ii)). Relief from the antitrust laws under the Reed-Bulwinkle Act is strictly limited to the terms of the approved agreement, and it does not extend to conduct that the ICC is not empowered to authorize, or if empowered, has not authorized.

15. During all or part of the time covered by this complaint, each of the motor carriers named as defendants

herein was a party to the collective ratemaking agreement approved by the ICC for the NFTB. Niagara Frontier Tariff Bureau—Agreement, 297 I.C.C. 494 (1955) (hereinafter "NFTB agreement"). The NFTB agreement remained in effect for all times pertinent to this complaint. The NFTB agreement authorized the members of the NFTB to set rates collectively for motor carrier freight traffic between the United States and Canada through authorized committees, provided the carriers adhered to the procedures set forth in the NFTB agreement and ICC regulations, including a variety of notice, publication and public hearing procedures. At all times pertinent to this Complaint, the NFTB agreement preserved each carrier's right to take independent action.

16. The international traffic revenues of NFTB carriers with the requisite authority freight across the United States/Canada border were at least $330.3 million in 1980 and $344.8 million in 1979. For the period 1970 through approximately 1980, international traffic revenues of such NFTB carriers were $2.8 billion. The defendant motor carriers and their co-conspirators accounted for most of the cross-border traffic among NFTB motor carriers.

17. The transportation of freight between the United States and the Province of Ontario, Canada is in the interstate and foreign commerce of the United States and affects the interstate and foreign commerce of the United States.

VIII. VIOLATIONS ALLEGED

18. Beginning at least as early as 1966 and continuing at least into 1981, the exact dates unknown to the plaintiff, the defendants and co-conspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate and foreign trade and commerce of the United States in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). The aforesaid unlawful combination and

conspiracy may be renewed unless the relief hereinafter prayed for is granted.

19. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise and maintain prices and to inhibit or eliminate competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada without complying with the terms of the NFTB agreement and by otherwise engaging in conduct that either was not or could not be approved by the ICC.

20. In furtherance of the aforesaid combination and conspiracy the defendants and co-conspirators have done those things that they combined and conspired to do, including among others:

(a) Participated in a Principals Committee which was comprised of the senior managmeent officials of NFTB carriers that had extra-provincial authority. The Principals Committee was not authorized or approved by the ICC to engage in ratemaking conduct. Through the Principals Committee, the defendants and co-conspirators engaged in the joint setting of rates and related policies and also agreed upon methods by which to inhibit competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada;

(b) Set and controlled NFTB rate levels without complying with the notice, publication, public hearing or record keeping requirements of the NFTB agreement and ICC regulations;

(c) Held Principal Committee and other meetings to plan threats, coercion and retaliation against an NFTB member carrier for exercising its right of independent action;

(d) Through pressure, coercion, threats of retaliatory rate reductions, taking retaliatory rate reductions, internal NFTB practices, and other means, inferfered with, restrained and restricted the right of NFTB member carriers and non-member carriers to make rates independent of the NFTB agreed-upon rate; and

(e) Filed tariffs with the ICC in Washington, D.C. that were in furtherance of the conspiracy.

IX. EFFECT OF THE COMBINATION AND CONSPIRACY

21. The combination and conspiracy has had the following effects:

(a) Rates for the transportation of freight motor carriage between the United States and the Province of Ontario, Canada have been fixed, raised or maintained at artificial and non-competitive levels;

(b) Competition between and among the defendant motor carriers, their co-conspirators and other persons engaged in the transportation of freight by motor carrier in the United States-Ontario, Canada trade has been restrained; and

(c) Competition generally in trade and commerce in the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada has been surpressed.

X. DAMAGES

22. During and throughout the period of the aforesaid combination and conspiracy, plaintiff and members of the class it represents were charged substantial monies for the carriage of cargo by defendants and/or their co-conspirators. By reason of the defendants' and their co-conspirators' illegal conduct, plaintiff and the members of the class it represents were compelled to pay and have paid

substantially higher charges for the carriage of cargo than they would have paid absent defendants' combination and conspiracy.

23. As a result of the defendants' illegal combination and conspiracy, plaintiff and the class it represents have sustained substantial loss and damage in their business and property in an amount which is presently undetermined.

XI. FRAUDULENT CONCEALMENT

24. Prior to June, 1983, plaintiff had no knowledge of the aforesaid antitrust violations, or of any facts which might have led to discovery thereof. Plaintiff could not have discovered the violation at an earlier date by the exercise of due diligence because of the deceptive practices and techniques of secrecy employed by defendants and their co-conspirators to avoid detection of, and fraudulently conceal, such violations.

XII. PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that:

(a) The Court adjudge and decree that the defendants, and each of them, have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act;

(b) Plaintiff and other members of the class recover threefold the damages determined to have been sustained by each of them respectively, and that joint and several judgment be entered herein against defendants, and each of them, for the amount determined;

(c) Each of the defendants, successors, assignees, subsidiaries, and transferees, and their respective officers, directors, agents and employees, and all other persons acting or claiming to act on behalf thereof or in concert there-

with, be perpetually enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the aforesaid combination, conspiracy, agreement, understanding or concert of action, adopting or following any practice, plan, program or design, having a similar purpose or effect in restraining competition;

(d) Plaintiff and members of the class it represents recover the costs of this suit, together with a reasonable attorneys' fee;

(e) The Court grant such other further and different relief as the case may require and the Court may deem just and proper under the circumstances; and

(f) Plaintiff demands a trial by jury of all issues so triable in this case.

LEVIN & FISHBEIN

By: /s/ ARNOLD LEVIN
Arnold Levin
Howard J. Sedran
320 Walnut Street, Suite 600
Philadelphia, PA 19106
(215) 592-1500

and

BERGER & MONTAGUE

By: /s/ H. LADDIE MONTAGUE, JR.
David Berger
H. Laddie Montague, Jr.
Howard I. Langer
1622 Locust Street
Philadelphia. PA 19103
(215) 875-3000

and

GREENFIELD & CHIMICLES
By: /s/ RICHARD D. GREENFIELD
Richard D. Greenfield
110 Montgomery Avenue
Bala Cynwyd, PA 19004
(215) 667-1700

and

SILVER, FREEDMAN & TAFF
By:
Howard J. Ross
1800 M Street, N.W.
Washington, D.C. 20005
(202) 293-3170

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

Civ. No. 158-C

SQUARE D COMPANY,
Plaintiff,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Defendants.

Civ. No. 157-C

BIG D BUILDING SUPPLY CORP.,
Plaintiff,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC.., *et al.*,
Defendants.

MOTION OF ALL DEFENDANTS FOR JUDGMENT ON THE PLEADINGS AS TO PLAINTIFFS' DAMAGE CLAIMS

Pursuant to Rules 12(c) and 12(h)(2) Fed.R.Civ.P., Defendants Niagara Frontier Tariff Bureau, Inc., Bondy Cartage Limited, Dominion-Consolidated Truck Lines Limited., ICL International Carriers Ltd., Inter-City Truck Lines (CANADA), Inc. and TNT Canada, Inc. move for judgment on the pleadings as to Plaintiffs' claims for damages in each of the above-captioned actions on the ground that neither Complaint states a claim upon which money damages can be granted, and Defendants are entitled to judgment in their favor on those claims as a matter of law, assuming the truth of all material allegations of the Complaints.

Oral argument is requested.

Respectfully submitted,

/s/ Lester M. Bridgeman
Lester M. Bridgeman
Louis T. Urbanczyk
Louis E. Emery
Bridgeman & Urbanczyk
304 Capital Gallery East
600 Maryland Avenue, S.W.
Washington, D.C. 20024
(202) 484-5911

/s/ Norman E.S. Greene
Norman E.S. Greene
Miller, Farmelo, Cane & Greene
1601 Liberty Bank Building
Buffalo, New York 14202
(716) 853-3040

Attorneys for Inter-City Truck Lines (CANADA), Inc.

/s/ Bryce Rea, Jr.
Bryce Rea, Jr.
Donald E. Cross
Leo C. Franey
Rea, Cross & Auchincloss
918 16th Street, N.W.
Washington, D.C. 20006
(202) 785-3700

David G. Brock
Jaeckle, Fleischmann & Mugel
700 Liberty Bank Building
Buffalo, New York 14202
(716) 856-0600

Attorneys for Niagara Frontier Tariff Bureau, Inc.

/s/ John W. Bryant
John W. Bryant
Eames, Wilcox, Mastej & Bryant
900 Guardian Building
Detroit, Michigan 48226
(313) 963-3750

J. Edmund DeCastro, Jr.
Jaeckle, Fleischmann & Mugel
700 Liberty Bank Building
Buffalo, New York 14202
(716) 856-0600

Attorneys for Bondy Cartage Limited

/s/ Donald L. Flexner
Donald L. Flexner
William Randolph Smith
Crowell & Moring
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-5800

Robert B. Conklin
Hodgson, Russ, Andrews, Woods & Goodyear
Suite 1800, One M & T Plaza
Buffalo, New York 14203
(716) 856-4000

Attorneys for Dominion-Consolidated Truck Lines Limited

/s/ Peter A. Greene
Peter A. Greene
Charles L. Freed
Thompson, Hine and Flory
1920 N Street, N.W.
Washington, D.C. 20036
(202) 331-8800

James M. Kieffer
Damon & Morey
1600 Main Place Tower
Buffalo, New York 14202
(716) 856-5500

Attorneys for ICL International Carriers, Ltd.

/s/ Peter D. Standish
Peter D. Standish
Joel B. Harris
Charles J. Ferris
Weil, Gotshal & Manges
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Phillips, Lytle, Hitchcock, Blaine & Huber
3400 Marine Midland Center
Buffalo, New York 14203
(716) 847-8400

Attorneys for TNT Canada, Inc.